9 PERC ¶ 16100

CALIFORNIA STATE EMPLOYEES' ASSOCIATION (DEES)

California Public Employment Relations Board

Tommie R. Dees, Charging Party, v. California State Employees' Association, Respondent.

Docket No. SF-CO-5-H

Order No. 496-H

March 14, 1985

Before Hesse, Chairperson; Jaeger, Morgenstern and Burt, Members

Duty Of Fair Representation -- Ineffective Processing Of Grievances -- Prima Facie Case -- 23.24, 71.226, 73.113 Employee's charge did not state prima facie violation of union's duty of fair representation where evidence showed that union processed each of his grievances and there was no evidence that union's refusal to seek arbitration of grievances was arbitrary, discriminatory or in bad faith.

APPEARANCE:

Tommie R. Dees, on his own behalf.

DECISION

This case is before the Public Employment Relations Board on appeal by charging party of the Board agent's dismissal, attached hereto, of his charge alleging that the California State Employees' Association violated section 3571.1 of the Higher Education Employer-Employee Relations Act (Gov. Code sec. 3560 et seq.).

We have reviewed the dismissal and, finding it free from error, adopt it as the Decision of the Board itself.

ORDER

The unfair practice charge in Case No. SF-C0-5-H is DISMISSED WITHOUT LEAVE TO AMEND.

GENERAL COUNSEL'S DECISION

Pursuant to Public Employment Relations Board (PERB or Board) Regulation section 32630, the above-entitled matter is hereby dismissed because it fails to allege facts sufficient to state a prima facie violation of the Higher Employer-Employee Relations Act (HEERA or Act).1 The reasoning which underlies this dismissal follows.

PROCEDURAL BACKGROUND

On May 21, 1984, Tommie R. Dees (Charging Party) filed an unfair practice charge against the California State Employees Association (Association or CSEA) alleging violation of HEERA section 3571.1. During the six months preceding the filing of this charge, Charging Party alleges several incidents to have occurred which gave rise to meritorious grievances, requests by him directed to CSEA representatives that the matters be grieved, and failure and/or refusal by such representatives to pursue the grievance to arbitration or to adequately represent Charging Party during the grievance procedure because CSEA and Charging Party's employer, California State

University at Hayward (CSU), are in collusion against him.

On August 2, 1984, the General Counsel's Office of PERB wrote a letter to Charging Party pointing out the deficiencies of the unfair practice charge filed against CSEA. More specifically, I informed the Charging Party that if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, Charging Party should amend the charge accordingly. (This letter is labelled Exhibit 1 and is attached hereto.)

Thereafter, the Charging Party filed a First Amended Charge on August 21, 1984 which essentially incorporated the facts and allegations contained in the original unfair practice charge and included some new facts, allegations and conclusory assertions.

FACTS

My investigation revealed the following facts: Charging Party is employed at the California State University, Hayward (CSU) as a groundsperson. Charging Party describes several incidents which, in his opinion, show that CSEA has not adequately represented him/or has refused to represent him in the grievance procedure.

1. Charging Party alleges that the union negligently decided on June 3, 1983 to file a grievance on behalf of Charging Party on only two of his allegations.2 The two allegations were that (1) Charging Party was given a permanent shift change without the required 21-day notice and, (2) Charging Party was called back to work on an off-day and was only given one hour backpay instead of four hours backpay as required by the contract. CSEA won this grievance at Level I for the Charging Party on or about June 20, 1983.

2. CSEA filed a grievance on behalf of Charging Party on June 10, 1983 on the following issues:

> a. 4/27/83--Mario Ruiz (supervisor) threatened Charging Party by stating: "I'd like to drill you."
>
> b. 4/21/83--Charging Party was forced to work under unsafe conditions on Harder Road because he wanted an entire lane closed. Charging Party received the following award: CSU adopted new procedures to provide an added measure of safety by providing "visibility vests" to employees whenever they worked adjacent to a roadway in addition to the placing of cones beside the curb.
>
> c. 4/25/83--Letter of Warning based on untrue allegations violated Charging Party's contract rights, and it did not follow proper disciplinary procedures.
>
> d. 4/20/83--A disciplinary meeting was held with CSU and Charging Party without Charging Party's representative present.

All of these grievances (except b., above) were denied by CSU on October 17, 1983 at Level III.

3. On July 28, 1983, CSEA filed a grievance on behalf of Charging Party on the following issues:

> a. On June 24, 1983, Charging Party had his first level hearing on a grievance filed against Mr. Ruiz (supervisor) for physically threatening Charging Party. On his way back to his area after the first level hearing, Mr. Rodriguez (supervisor) ordered the Leadperson "to write Charging Party up" for being out of his area.
>
> b. On June 27, 1983, Charging Party was on his regularly scheduled break at l:35 p.m. Mr. Rodriguez (supervisor) saw him and demanded to know why he was out of his area. He then threatened to "write Charging Party up" for insubordination and being out of his area.
>
> c. On July 16, 1983, Mr. Ruiz (supervisor) gave Charging Party a work assignment which was in direct violation of his assignment from his Leadperson. Further, a memo from Rodriquez to Ruiz on July 13, 1983, articulated the policy

by which Grounds Supervisors were to communicate with Groundsworkers, only through the Leadpersons. The assignment which was given to Charging Party was impossible and unsafe; it consisted of planting roses, weeding and raking leaves alongside the parking lot located by the Administration Building.

Charging Party alleges that CSEA failed to include an allegation to the effect that on or about July 27, 1984 Mr. Rodriguez (supervisor) chased him through Plant Operations inside the office while Charging Party was signing out to go see the doctor.3

4. On or about October 17, 1983, CSU denied Charging Party's grievance at Level III (described in 2, above), and the CSEA representative determined within 14 days not to take it to arbitration. 4 Nevertheless, Charging Party and his union representative (Gale Pemberton) were allowed to present Charging Party's case to the CSEA Arbitration Panel on or about November 12, 1983 wherein they argued that the case should go to arbitration. The panel decided not to go to arbitration on the grievances mentioned in item 2 above, because the allegations were not meritorious, but Charging Party received assurances that CSEA would file on some of his other allegations on the basis of reprisal by CSU. Charging Party contends that they should have gone to an arbitration hearing and that CSEA failed to comply with the 14-day time limitation.

5. On November 3, 1983, Marilyn Sardonis (CSEA representative) filed a grievance on behalf of Charging Party seeking to have 44 hours of leave without pay converted to sick leave in addition to restoration of all benefits. Charging Party won this grievance on or about January 11, 1984 at Level II.

6. On December 7, 1983, Marilyn Sardonis (CSEA representative) filed a Level I grievance on behalf of Charging Party alleging that Charging Party's transfer to the Science Building was a reprisal for his exercise of protected activity. She also alleged that the transfer was dangerous to Charging Party's health. This Level I grievance was denied by Mr. Farley, Plant Operation Director for CSU, on or about February 21, 1984.

7. On February 28, 1984, Marilyn Sardonis (CSEA representative) elevated the grievance in item 6 above; to Level II. This Level II grievance was denied by Mr. Robert Kennelly, Administrative Vice-President for CSU, on March 28, 1984.

8. On February 29, 1984, Marilyn Sardonis (CSEA representative) wrote a letter to Mr. Slade Lindeman, Personnel Officer for CSU, requesting that Charging Party's State Compensation Insurance Fund material be removed from Charging Party's personnel file and be placed in a separate file to ensure confidentiality. CSU refused to set up a separate file.

9. On April 16, 1984, Marilyn Sardonis (CSEA representative) filed a Level III grievance on behalf of Charging Party alleging 38 incidents by CSU which are a form of reprisal, harassment and intimidation against Charging Party.5 CSEA has not proceeded any further on this Level III grievance because Charging Party has asked them to stop. Nevertheless, Charging Party alleges that he has received no decision regarding this Level III grievance. (This Level III grievance is labelled Exhibit 2, and it is attached hereto.)

DISCUSSION

Charging Party has alleged that CSEA violated his section 35786 right to fair representation and thereby violated section 3571.1(b). The fair representation duty imposed on the exclusive representative extends to contract negotiations *(Redlands Teachers Association (Faeth)* (9/25/78) PERB Decision No. 72; *SEIU, Local 99 (Kimmett)* (1/19/79) PERB Decision No. l06; *Rocklin Teachers Professional Association (Romero)* (3/26/80) PERB Decision No. 124; *El Centro Elementary Teachers Association (Willis)* (8/11/82) PERB Decision No. 232); contract administration *(Castro Valley Teachers Association (McElwain)* (12/17/80) PERB Decision No. 149; *SEIU Local 99 (Pottorff)* (3/30/82) PERB Decision No. 203) and grievance handling *(Fremont Teachers Association (King)* (4/21/80) PERB Decision No. 125; *United Teachers of Los Angeles (Collins)* (11/17/82) PERB Decision No. 258).

PERB has ruled that a prima facie statement of such a violation requires allegations that: (1) the acts complained of were undertaken by the organization in its capacity as the exclusive representative of all unit employees; and (2) the representational conduct was arbitrary, discriminatory, or in bad faith.7

With regard to the allegation that CSEA failed to proceed to arbitration, PERB has held that an employee does not have an absolute right to have a grievance taken to arbitration. An exclusive representative's reasonable refusal to proceed with arbitration is essential to the operation of a grievance and arbitration system. *(Castro Valley Unified School District* (12/17/80) PERB Decision No. 149; *Los Angeles Unified School District* (5/20/83) PERB Decision No. 311.)

First, allegations 1, 2, 3 and 4 will be dismissed because they occurred more than six months prior to the filing of this charge before the PERB. Government Code section 3563.2(a) states that PERB cannot issue a complaint in respect of any charge based upon an alleged unfair [sic] ccurring more than six months prior to the filing of the charge.

Secondly, the facts in this case (set forth in allegations 5-9, above) do not state a prima facie violation of HEERA section 3571.1(b) or a case of collusion between CSEA and CSU against Charging Party. CSEA did consider whether to submit Charging Party's first grievance to arbitration and determined that it was not meritorious. There is no evidence that the Association's conduct was arbitrary, discriminatory or in bad faith. The other grievances (Exhibit 2 [omitted]) have not been advanced to arbitration because Charging Party has requested that they not proceed with those grievances. Finally, the evidence indicates that the Association filed a grievance on every one of Charging Party's disputes with CSU.

Pursuant to Public Employment Relations Board regulation section 32635 (California Administrative Code, title 8, part III), you may appeal the refusal to issue a complaint (dismissal) to the Board itself.

_____

1 The HEERA is codified at Government Code section 3560, et seq., and is administered by PERB. Unless otherwise indicated, all statutory references in this dismissal are to the Government Code. HEERA section 3571.1 provides that it shall be unlawful for an employee organization to:

> (a) Cause or attempt to cause the higher education employer to violate Section 3571.
>
> (b) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (c) Refuse or fail to engage in meeting and conferring with the higher education employer.
>
> (d) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3590).
>
> (e) Fail to represent fairly and impartially all the employees in the unit for which it is the exclusive representative.
>
> (f) Require of employees covered by a memorandum of understanding to which it is a party the payment of a fee, as a condition precedent to becoming a member of such organization, in an amount which the board finds excessive or discriminatory under all the circumstances. In making such a finding, the board shall consider, among other relevant factors, the practices and customs of

employee organizations in higher education, and the wages currently paid to the employees affected.

(g) Cause, or attempt to cause, an employer to pay or deliver, or agree to pay or deliver, any money or other thing of value, in the nature of an exaction, for services which are not performed or are not to be performed.

[2] On June 3, 1983, CSEA did not file a grievance on the following allegations by Charging Party, although these issues were the subjects of later grievances according to the documents submitted by Charging Party.

a. Physical threat by Charging Party's supervisor. CSEA determined that the verbal statement that supervisor "would like to drill you" means according to American Heritage Dictionary that he would like "to train by repetition." According to CSEA, this does not constitute physical threat to Charging Party; thus, no grievance was filed at this time. Subsequently, on June 10, 1983, CSEA filed a grievance on behalf of Charging Party on this issue.

b. Charging Party wanted to return to working weekends. According to CSEA, management had the right to assign work schedules. According to CSEA, Charging Party's personal preference was not a valid requirement for forcing management to change its shift. CSEA advised Charging Party to submit a shift change by writing a request to supervisor for his consideration.

c. Charging Party requested that management give all orders to him in writing. According to CSEA, this was not a valid request; management may give verbal orders.

d. Charging Party requested that management cease harassing him, but according to CSEA Charging Party could not show harassment other than normal supervisory functions. CSEA advised Charging Party that if he was able to prove harassment, then CSEA would be prepared to represent him. Charging Party claimed that his supervisors were harassing him because they gave him supervisory and instructional orders. Charging Party wanted to receive all orders and instructions from his leadperson rather than his supervisors.

e. Charging Party demanded that management make full disclosure of this management meetings to him. According to CSEA, this was neither his right, nor the union's right.

f. Charging Party demanded that management give advance notice prior to checking on his work performance. According to CSEA, management had the right to check work performance whenever deemed necessary without prior notice.

g. Finally, CSEA indicated that it was still investigating Charging Party's complaints about insufficient break and lunch periods.

[3] On or about April 16, 1984, CSEA representative, Marilyn Sardonis, filed a grievance on this allegation as an act of reprisal by CSU against Charging Party. (See Exhibit 2, paragraph 19, attached hereto.)

[4] CSEA claims that there is a side letter with CSU which allows CSEA 30 days in which to seek arbitration after receiving the Level III response.

[5] Charging Party contends that CSEA failed to comply with Article 7, section 7.15 of the contract, which requires that all appeals to Level III be filed no later than 14 days after the Level II response. Charging Party also contends that CSEA failed to include all necessary evidence at Level II as required by the contract. CSEA counters that the appeal is timely filed because it received an oral extension of time by Laverne Diggs, and that it included all evidence at the third level which is consistent with the contract and past practices. Moreover, the contract provides in Article 7, section 7.22 that all issues and evidence must be presented at Level III in order for the arbitrator to properly consider them. Further, CSU has indicated to PERB that it is willing to process the Level III grievance, but that CSEA has not moved it along. CSEA correctly asserts that it has not pushed the Level III grievance because Charging Party has asked them to stop processing it.

[6] Section 3578 states:

> The employee organization recognized or certified as the exclusive representative shall represent all employees in the unit, fairly and impartially. A breach of this duty shall be deemed to have occurred if the employee organization's conduct in representation is arbitrary, discriminatory, or in bad faith.

[7] PERB explicitly has followed decisions of the federal courts and the National Labor Relations Board interpreting the National Labor Relations Act duty of fair representation *(Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608 [116 Cal.Rptr. 507]; and see *Kimmett, supra,* PERB Decision No. 106 at fn. 7).

EXHIBIT I

On May 21, 1984, Tommie R. Dees (Charging Party) filed an unfair practice charge against the California State Employees Association (CSEA) alleging violation of HEERA section 3571.1. More specifically, Charging Party alleges the following. Charging Party is employed at the California State University, Hayward (CSU) as a groundsperson. During the six months preceding the filing of this charge, Charging Party alleges several incidents to have occurred which gave rise to meritorious grievances, requests by him directed to CSEA representatives that the matters be grieved, and failure and/or refusal by such representatives to pursue the grievance to arbitration or to adequately represent Charging Party during the grievance procedure.

Charging Party describes several events which, in his opinion, showed that CSEA has not adequately represented him in the grievance procedure. Charging Party alleges that CSEA failed to notify the Chancellor's office at CSU, Hayward in writing within 14 days from the date the union received the level III denial of grievance and has refused to go forward with arbitration. Charging Party additionally argues that CSEA is not vigorously prosecuting his grievances concerning his transfer and reprisals beyond the level III grievance step to arbitration.

My investigation reveals that the Association has filed a grievance on behalf of the Charging Party concerning every dispute with CSU. Additionally, the Association did consider whether to submit Charging Party's first grievance to arbitration and determined that it was not meritorious. The other grievances have not been advanced to arbitration because Charging Party has requested that they not proceed with those grievances.

Charging Party has alleged that CSEA violated his section 3578 right to fair representation and thereby violated section 3571.1(b).1 The fair representation duty imposed on the exclusive representative extends to contract negotiations *(Redlands Teachers Association (Faeth)* (9/25/78) PERB Decision No. 72;*SEIU, Local 99 (Kimmett)* (1/19/79) PERB Decision No. 106; *Rocklin Teachers Professional Association (Romero)*(3/26/80) PERB Decision No. 124; *El Centro Elementary Teachers Association (Willis)* (8/11/82) PERB Decision No. 232),contract

administration *(Castro Valley Teachers Association (McElwain)* (12/17/80) PERB Decision No. 149; *SEIU Local 99 (Pottorff)* (3/30/82) PERB Decision No. 203) and grievance handling *(Fremont Teachers Association (King)* (4/21/80) PERB Decision No. 125; *United Teachers of Los Angeles (Collins)* (11/17/82) PERB Decision No. 258).

PERB has ruled that a prima facie statement of such a violation requires allegations that: (1) the acts complained of were undertaken by the organization in its capacity as the exclusive representative of all unit employees; and (2) the representational conduct was arbitrary, discriminatory, or in bad faith.2

The charge, as presently set forth, does not state a prima facie violation of HEERA section 3571.1(b). First, there is no allegation that the Association's conduct was arbitrary, discriminatory or in bad faith. Second, the charge indicates that the Association filed a grievance on every one of Mr. Dee's disputes with CSU. (See PERB Rule 32615.)3

If you feel that there are facts which would correct the deficiencies explained above, please amend the charge accordingly. The amended charge should be prepared on a standard PERB unfair practice charge form clearly labeled First Amended Charge, contain *all* the facts and allegations you wish to make, and be signed under penalty of perjury by the Charging Party. Please be sure to indicate the PERB charge number. The amended charge must be served on the Respondent and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before August 10, 1984, I shall dismiss your charge.

_____

1 Section 3578 states:

> The employee organization recognized or certified as the exclusive representative shall represent all employees in the unit, fairly and impartially. A breach of this duty shall be deemed to have occurred if the employee organization's conduct in representation is arbitrary, discriminatory, or in bad faith.

Section 3571.1(b) states that it shall be unlawful for an employee organization to:

> Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

2 PERB explicitly has followed decisions of the federal courts and the National Labor Relations Board interpreting the National Labor Relations Act duty of fair representation *(Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608 [116 Cal.Rptr. 507]; and see *Kimmett, supra,* PERB Decision No. 106 at fn. 7).

3 PERB Rule 32615 states in pertinent part:

> (a) A charge may be filed alleging that an unfair practice or practices have been committed. The charge shall be in writing, signed under penalty of perjury by the party or its agent with the declaration that the charge is true and complete to the best of the charging party's knowledge and belief, and contain the following information:
>
> . . .